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Jamaica Car Wash d/b/a Sutphin Car Wash and Retail, Wholesale and Department Store Union, RWDSU. Case 29–CA–169069

July 6, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS
PEARCE AND MCFERRAN

On January 9, 2017, Administrative Law Judge Kenneth W. Chu issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions² and to adopt the recommended Order.

¹ The General Counsel has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In affirming the judge’s findings, we do not rely on his statement that the Respondent’s car wash employs over 60 members of the bargaining unit: the record shows, and the judge found elsewhere in his decision, that the Respondent employs 10 to 15 workers at the facility involved in this case.

With respect to the Respondent’s alleged violations of Sec. 8(a)(1), the General Counsel contends that the judge erred in discussing the absence of evidence that employees other than the General Counsel’s two witnesses were subject to the same alleged unlawful conduct. In support, the General Counsel relies on precedent stating that a discriminatory motive, otherwise established, is not disproved by evidence that the employer did not discriminate against all union adherents. See, e.g., *Igramo Enterprise, Inc.*, 351 NLRB 1337, 1339 (2007), *review denied* 310 Fed. Appx. 452 (2d Cir. 2009). The judge engaged in the discussions the General Counsel challenges in the course of assessing the credibility of particular witnesses’ testimony. The precedent the General Counsel cites does not apply to credibility determinations and is inapposite. The presence or absence of evidence of similar conduct may be relevant to a judge’s credibility determinations, and the judge did not err in considering it in this case. See *Boot-Ster Manufacturing Co.*, 149 NLRB 933, 938 *fn.* 5 (1964) (employee’s testimony that supervisor made coercive statements to her was made “more credible” by similar statements he made to other employees), *enfd.* 361 F.2d 325 (6th Cir. 1966); *United States Air Conditioning Corp.*, 128 NLRB 117, 132–133 (1960) (supervisor’s denial that he asked an employee how he voted was more credible considering that he “never asked any other employee how they voted in the election or felt about the Union, except one [which he admitted]”), *enfd.* 336 F.2d 275 (6th Cir. 1964).

² We agree with the judge that the General Counsel did not meet his initial burden under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), of showing

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. July 6, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

that the Respondent discharged employee Yovani Castillo because it believed that Castillo supported the Union. We reject the General Counsel’s contention that the judge erred by applying *Wright Line* to the allegation that the Respondent acted based on its belief that Castillo supported the Union. See *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. at 3 (2014).

We affirm the judge’s conclusion that the Respondent did not unlawfully interrogate employees in preparation for the hearing in this case under *Johnnie’s Poultry Co.*, 146 NLRB 770 (1964), *enf. denied* 344 F.2d 617 (8th Cir. 1965), based on testimony by employee Eduardo Vasquez and Assistant Manager Donald Montezuma that the Respondent’s General Manager Fernando Magalhaes did not ask employees any questions at the June 2016 meeting. In light of this conclusion, we find it unnecessary to rely on the judge’s discussion of whether Magalhaes coercively interrogated Vasquez under *Rossmore House*, 269 NLRB 1176 (1984), *enfd. sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

We find it unnecessary to decide whether the Respondent unlawfully interrogated employees at the June 2016 meeting through officials other than Magalhaes because the complaint allegation was limited to questioning by Magalhaes. We also find it unnecessary to decide whether Assistant Manager Montezuma was a statutory supervisor or an employee because the General Counsel never argued to the judge that Magalhaes unlawfully questioned Montezuma, and the Respondent was thus never put on notice that Montezuma’s statutory supervisory status might be at issue.

Finally, in affirming the judge’s conclusions, we do not rely on his citations to *Brighton Retail, Inc.*, 354 NLRB 441 (2009), *Saigon Grill Restaurant, Inc.*, 353 NLRB 1063 (2009), and *Inn at Fox Hollow*, 352 NLRB 1072 (2008), cases which were decided by a two-member Board. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). Neither do we rely on the judge’s citation to *Temecula Mechanical, Inc.*, 358 NLRB 1225 (2012), a decision that issued at a time when the Board included two persons whose appointments to the Board the Supreme Court subsequently held were not valid. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

Chairman Miscimarra does not necessarily endorse all aspects of the judge’s legal analysis, but he agrees with the judge’s conclusion that the complaint should be dismissed.

Emily Cabrera, Esq., for the General Counsel.
Liz Vladeck, Esq. (Cary Kane, LLP), for RWDSU.
Stephen D. Hans, Esq. (Stephen D. Hans and Associates, P.C.),
 for the Respondent.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in Brooklyn, New York, on June 21–23 and July 7, 8, 2016, pursuant to a complaint issued by Region 29 of the National Labor Relations Board (NLRB) on May 12, 2016.¹ The Jamaica Car Wash d/b/a Sutphin Car Wash (Respondent) timely filed an answer denying the material allegations in the complaint (GC Exh. 1).²

On the entire record, including my assessment of the witnesses' credibility and my observation of their demeanor at the hearing and corroborating the same with the adduced evidence of record, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND UNION STATUS

The Respondent is in the business of cleaning and detailing cars at its facility in Jamaica, New York, where it purchased and received goods valued in excess of \$50,000 in the course and conduct of its operations. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Retail, Wholesale Department Store Union, RWDSU (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that

(a) On or about December 3, 2015, the Respondent threatened employees that supporting the Charging Party Union was futile;

(b) On or about December 3, 2015, and about mid-December 2015, the Respondent promised employees raises if they ousted the Charging Party Union;

(c) On or about December 3, 2015, and about mid-December 2015, the Respondent promised employees additional work hours if they ousted the Charging Party Union;

(d) On or about December 3, 2015, and mid-December 2015, the Respondent threatened employees with termination if they supported the Union;

(e) About mid-December 2015, the Respondent instructed employees not to speak to union representatives;

(f) On or about February 25, 2016, the Respondent, by General Manager Fernando Magalhaes, at its Jamaica facility, threatened employees with unspecified reprisals for engaging in union and other protected concerted activities;

(g) On or about February 28, 2016, the Respondent, by supervisor Israel Palacios, in his car, interrogated employees about the union activities of other employees; and

(h) On or about December 23, 2015, the Respondent terminated the employment of Yovani Castillo.³

The complaint alleges that through such conduct, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act in violation of Section 8(a)(1) of the Act and has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

On June 30, 2016, the General Counsel's motion to amend the complaint (GC Exh. 7) was granted to include

(i) During the first week of June 2016, the Respondent, by Magalhaes, at its Jamaica facility, interrogated employees regarding the union activities and other protected concerted activities of Yovani Castillo; and

(j) On or about February 25, 2016, Yovani Castillo, through the Charging Party Union, sought reinstatement to his former position of employment and Respondent refused to reinstate Yovani Castillo to his former position of employment.

The amended complaint alleges that Respondent engaged in the conduct described above because Castillo engaged in union activities and to discourage employees from engaging in these activities. It is further alleged that the Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Sections 8(a)(3) and (1) of the Act.⁴

A. Background

The Respondent operates a car wash facility that cleans and details vehicles. The president of the car wash facility was and is Fernando Magalhaes. Magalhaes is also the owner of other car wash facilities not subject to this complaint. Israel Palacios has been and is the supervisor at the car wash for 12 years. He is directly responsible for giving work assignments to approximately 10–15 employees and determines the work schedule and days off for these employees.

At all material times, the Retail Wholesale and Department Store Union (Union) has been recognized as the exclusive collective-bargaining representative of a unit of employees consisting of

all employees working on the premises of the Employer performing services needed for washing or detailing automobiles and other vehicles, (called herein "car washers" or "workers") at the Employer's facility located at 9731 Sutphin

¹ All dates are in 2015 unless otherwise indicated.

² The exhibits for the General Counsel are identified as "GC Exh." and Respondent's exhibits are identified as "R. Exh." The closing briefs are identified as "GC Br." and "R. Br." for the General Counsel and the Respondent, respectively. The hearing transcript is referenced as "Tr."

³ Testimony at the hearing indicated that Castillo was allegedly discharged on December 24 after his phone conversation with supervisor Israel Palacios (Tr. 201).

⁴ The complaint inartfully set forth the allegations that "employees" were threatened for supporting the Union and promised certain benefits if the employees worked to remove the Union. At the hearing, the General Counsel conceded that the only employees subjected to such alleged threats and promises were Yovani Castillo, Fernando Gomez and Diego Hernandez (Tr. 259).

Boulevard, Jamaica, NY except for cashiers, managers and supervisors and guards as defined in the National Labor Relations Act.

This recognition has been embodied in a collective-bargaining agreement signed by Magalhaes and in effect from October 14, 2013, to October 13, 2016 (GC Exh. 3).

The car wash is open for business when the weather permits. Workers are instructed to listen to the weather forecast for the following day and to call the facility in the morning if they are uncertain if the facility would be open. Responsible management officials would also call the workers to tell them to come to work or not.

Employees are given work schedules, but their non-schedule day varies from week to week. A worker is given one non-schedule day off per week. Palacios testified that the employees usually work a 12-hour shift starting at 7 a.m. Routinely, the non-schedule day for the workers is posted by Palacios on Sundays for the following week. However, if the Respondent anticipates that the weather may be bad during the week, the workers are told not to come in.

During inclement weather, the car wash is closed to the public and the employees are told not to come in. As such, work at the car wash is depended upon fair weather but the Respondent may nevertheless call the employees in during inclement days for the employees to clean and perform maintenance on the car wash equipment. It is not disputed that the Respondent has an informal and flexible policy as to when or if an employee should work during inclement weather. Palacios testified that the workers know to check the weather forecast for the following day as to whether the car wash might be closed. However, employees may be called by management officials to work cleaning and maintaining the car wash equipment and premises. An employee may also call the car wash to ascertain whether there may be work during inclement weather.

Palacios has provided his cell phone number to the workers so they may call him usually before 9 a.m. to see if the car wash would be open for business for the upcoming day. The workers may also call Palacios if there is maintenance and cleaning work that could be done during inclement days. Palacios, in turn, has also called the workers to come to work in anticipation that the weather may improve later in the day or if he needed workers to clean the equipment when the car wash is closed to the public.

B. The Alleged Threats and Promises to Employees on December 3, 2015

Yovani Castillo (Castillo) and his cousin, Fernando Gomez (Gomez) sought employment with the Respondent at its car wash facility in Jamaica, New York, on December 3. Castillo and Gomez were not referred to the car wash by other workers nor had answered a notice seeking job applicants. It is not uncommon for itinerant workers to show up at the car wash seeking work. Palacios stated that oftentimes, individuals off the street would come looking for work. Sometimes the new hires are friends or relatives of the current workers. Palacios said that new hires need orientation to their job assignments and may not be hired immediately. In this instance, Palacios stated that Castillo and Gomez came looking for work on December 3

and were immediately hired.

Castillo confirmed that he was hired to work 6 days per week and would usually start his work day at 7 a.m. Gomez worked a Monday through Sunday schedule with 1 day off during the week. Gomez said that he worked from 7 a.m. to 7 p.m., but may leave earlier if there was no work. The work schedules for all employees were posted by Palacios every Sunday for the following week.

Upon being hired, Castillo was provided with Palacios' cell phone number. In turn, Palacios received the phone number of Castillo. Castillo stated that the work schedule is routinely posted on Sundays. Castillo said that their phone numbers were exchanged so that either party could contact the other if there was question as to whether there was work on a particular day depending on weather conditions. Castillo insisted that Palacios would call him when there may be some work during inclement weather (Tr. 28). Although the car wash would not be open to the public, the employees may nevertheless be called to perform cleaning and maintenance work on the equipment. Castillo also stated that if it was raining in the morning of a work day and if Palacios did not call, Castillo was instructed by Palacios to call the car wash to ascertain if there was any work (Tr. 197, 220).

The General Counsel alleges in the complaint that during the interview, the Respondent, through Palacios, threatened Castillo and Gomez that supporting the Union would be futile; promised them raises and additional work hours if they ousted the Union; and threatened them with termination if they supported the Union.

Castillo recalled his December 3 job interview with Palacios. Castillo said that the job interview with Palacios was about 20–25 minutes. Castillo said that Palacios mentioned the duties that they would be performing at the car wash, and some time and attendance and discipline policies. Castillo said that Palacios then turned his attention to the Union and asked whether Castillo and Gomez knew what a union was. Castillo said he was unfamiliar with the concept of a union. Castillo asked about the union benefits and break time. He did not ask anything else about the Union. Castillo maintains that Palacios started cursing about the Union; referred to the Union as "shit;" and that the Respondent was determined to get rid of the Union when the collective-bargaining agreement was set to expire in October 2016. According to Castillo, Palacios promised a salary increase to the workers if the Union were removed. Castillo testified that he was neither shocked nor upset over these comments.

Castillo testified that Palacios did not explain how the Respondent was going to remove the Union and that Palacios did not solicit his help to rid the Union. Castillo testified there were no other conversations about the Union after this alleged conversation on December 3. Castillo testified that he did not speak to nor did any employees or supervisors speak to him about the Union during his employment at the car wash (Tr. 182–184; 204–208).

Gomez testified that he started working at Jamaica Car Wash on December 3 after he was interviewed by Palacios. He was assigned as a cleaner and dryer of cars. Gomez also recalled that Palacios asked them if they knew what a union was.

Gomez replied he did not know and Palacios cursed the Union and told them that he did not want a Union and that the Union was not good for anything. Palacios also allegedly said to Gomez that Respondent wanted to get rid of the Union (Tr. 126, 127).

Gomez recalled that Palacios said the Union “. . . was not good for anything,” and referred to the Union with derogatory words. According to Gomez, he recalled that Palacios said to them that “the owner had said that if in October they got rid of the Union; he was willing to raise the salary and give more hours” (Tr. 118). Palacios allegedly said that only two workers supported the Union at the car wash facility. Gomez did not recall if anything else was said about the Union (Tr. 118, 119). Gomez said that there were some discussions over general work orientation matters (Tr. 131, 132).

According to Palacios, he explained the job assignments to Castillo and Gomez during their December 3 job interview. Both employees were assigned to dry the recently washed cars. Palacios and Castillo also exchanged phone numbers to contact each other if there was any work due to inclement weather. Palacios stated that part of his orientation includes telling the prospective employee that there is a union at the car wash. During their orientation, Palacios mentioned the Union to Castillo and Gomez. Palacios testified that Castillo and Gomez said they did not know what a union is. Palacios proceeded to explain the concept of a union to them.

Palacios denied criticizing the Union in front of Castillo and Gomez. Palacios confirmed that he mentioned the Union to Castillo and Gomez. Palacios maintains that Castillo said he was “alright” with the Union. Palacios testified he has no problems with the Union and has observed a representative from the Union speak to his workers on occasions. Palacios recalled only one dispute with the Union regarding the non-payment of a bonus during a holiday. Palacios recalled that the bonus issue was resolved to the satisfaction of the Union.

Palacios testified that his interview with Castillo and Gomez lasted about 10 minutes on December 3. He denied calling the Union “shit”; denied saying that “the Union was good for nothing” or that he wanted to get rid of the Union by October to Castillo or Gomez. He stated that he never had a problem with the Union. He also denied stating that he would increase everyone’s salary once the Union was gone. (Tr. 378–381).

C. The Alleged Threats and Promises to Employees In Mid-December 2015

Castillo testified that he worked uneventfully at the car wash from the time he was hired until Sunday, December 20, 2015. The General Counsel alleges that in the meanwhile, the Respondent was scheming to discharge Castillo.

In mid-December, Gomez had a conversation with Palacios regarding Castillo around 10–10:30 a.m.⁵ The conversation lasted about 10 minutes and no one else was present at the start of the meeting. It is alleged that Palacios asked Gomez if he knew anything about Castillo’s support for the Union. Gomez said he did not know. Palacios allegedly told Gomez that he

was going to fire Castillo because Castillo supported the Union and because he did not want any more people to support the Union. Palacios allegedly repeated that he wanted to get rid of the Union (Tr. 120). Palacios apparently told Gomez he didn’t want any more people to support the Union because another employee had told Palacios that Castillo was supporting the Union (Tr. 140). Palacios also allegedly pleaded with Gomez that he should not talk to the shop steward. At this point in the conversation, Palacios also repeated that the owner was willing to give more work hours and a higher salary if the workers got rid of the Union.

According to Gomez, at this point of their meeting, another boss by the name of “Jose” appeared and asked Palacios if there were any problems with Gomez. Palacios replied “no” and that the problem was with Castillo. It is further alleged that Jose told Palacios that Palacios “knows what he must do.”⁶

The Respondent proffered a general denial that there was a conversation between Gomez and Palacios in mid-December. Palacios testified that he never spoke to Gomez about the Union after Gomez’ December 3 job interview (Tr. 381).

Castillo testified that he asked Palacios on December 20 about his non-work day after noticing that his name was not listed for a day off for the upcoming work schedule week. According to Castillo, Palacios replied that he should not worry about his day off because it was anticipated that the car wash would be closed on December 21 due to rain in the forecast. Castillo testified that Palacios told him to call if there was any work for him on the morning of Tuesday, December 22.

Palacios stated that the schedule for the workers’ day off for December 21 through December 27 had included Castillo’s name and he was in fact listed with a day off for Monday, December 21 (R. Exh. 2). Palacios said that no one worked on December 21 or 22 due to the weather. Castillo insisted that the day-off schedule with his name and showing that he was off on Monday did not appear on the December 20 schedule (Tr. 233).

D. The Alleged Discharge of Castillo on December 24

On the morning of December 22, Castillo called the car wash but was unable to reach Palacios. Castillo did not work on December 22 and never received a return call from Palacios. By this time, Castillo was anxious about working so he decided to cell phone text Palacios on December 22 at 9:27 p.m. with regard to working on December 23. Castillo’s text message to Palacios was also to inquire about when he should pick up his paycheck. The following is the exchange of the text messages between Castillo and Palacios on December 22 (GC Exh. 4b at 1, 2):

Castillo: Mr. Israel (Palacios) I just ask if we are going to work tomorrow or not. Because I called you early this morning and you did not answer me. Sincerely, Yovani Castillo.

Palacios: I don’t think we will be open but call me around 8:30. I will let you know what time the payment arrives to go to pick it up.

⁵ Gomez did not recall the exact date of his conversation with Palacios.

⁶ Palacios identified “Jose” as Jose Peters, who is the brother of Magalhaes.

On December 23, Castillo arrived at the car wash to pick up his check and to inquire about work. Castillo met with Palacios that morning. Castillo received his paycheck, but there was no work for anyone on December 23 due to the inclement weather. Palacios informed Castillo to call on the morning of December 24 to see if there was any work for that day. As instructed, Castillo placed a call to Palacios on December 24 prior to 9 a.m. inquiring about work, but was only able to reach Palacios' assistant, Donald Montezuma.

According to Castillo, Montezuma told him to wait for Palacios to return his call. Again, anxious to work, Castillo decided to text Palacios by cell phone at 8:56 a.m. on December 24. The following text messages were exchanged between Castillo and Palacios (GC Exh. 4 at 3–7):

Castillo: Thanks, ok, then I [had] called Donald and [he] told me that he will let me know and I keep waiting and [he] did not let me know, yes or no. And you did not answer me. I don't know if they will let me know.

Palacios: Countryman, we will let you know later if we need you please [but] you know that the business is not good now.

Castillo: Ok, Thank you.

Palacios: There are too many people now.

Castillo: Then, neither tomorrow will I go [to work].

Palacios: No, now, we will wait if the snow comes and if we need you, we will call you, thanks.

Castillo: Ok, let me know please because I need the job.

Palacios: You know, countryman, sorry.

Castillo: Can I call you comrade.

Palacios: Later, if you want, I am leaving the hospital and I am going to drive.⁷

Castillo: Ok.

Palacios testified that the car wash was closed on December 22 and December 23 due to inclement weather (R. Exh. 1). He maintained that he informed Castillo via their text message exchange that the car wash would be closed on December 23 (GC Exh. 4b). The record shows that no one worked on December 23 (GC Exh. 3). Palacios also testified that the car wash was opened on December 24 and 25 (Tr. 98).

Castillo called Palacios at approximately 10 a.m. on December 24 after the morning exchange of text messages. The phone conversation between Castillo and Palacios was recorded on Castillo's cell phone (GC Exh. 5). Castillo testified that he recorded the phone conversation with Palacios because he had his doubts when Palacios told him there was already a sufficient number of workers for December 24. (Tr. 222, 223).

The phone conversation was less than 2 minutes according to Castillo. During the recorded phone conversation, Palacios affirmed to Castillo that there was no work for him because there were too many workers:

Castillo: Oh, calling you about the messages that you have sent me and I understand that you told me that I am not going to work.

Palacios: Not now, because we are too much people, I have too much people and no, no now.

Palacios also told Castillo that snow was coming and Castillo should wait until the snow passes and he will then call Castillo about coming to work. Castillo replied that this would mean there would be no work for him for December 24 and 25. Palacios affirmed again that there were too many workers and snow was expected on Christmas. Castillo said he was willing to call Palacios and Palacios replied

Palacios: No, No, if you can look for another thing, look for it, my neighbor, look for it, do you understand me, because now, we do not need you.

Castillo: Ah! Ok because the truth is that I need the job and...

Palacios: We all have necessities, countryman, but we have too many people and from where we will get the money to pay all these people.

Castillo: Yes, I know

Palacios: Anything I will let you know and I will call you.

Castillo: Ok.

Castillo testified that Palacios never called him for work after their December 24 phone conversation. Castillo believed from the phone conversation that Palacios had discharged him because he was told to look for work somewhere else.

The Respondent maintained that Castillo was still considered an employee through January 3, 2016 (R. Exh. 2). Palacios testified that he has disciplined workers for inappropriate conduct in the past but denied he has the authority to terminate an employee and has never discharged an employee during his tenure as a supervisor. Palacios denied discharging Castillo on December 24. Palacios said he discovered through Gomez either in late December or in early January 2016 that Castillo was working somewhere else. He asked Gomez about Castillo and Gomez allegedly replied that he was already working (Tr. 384). Palacios testified that Castillo never returned to work after January 3. The factual record shows that Castillo had not worked after December 20.

E. The Alleged Threats of Unspecified Reprisals for Engaging in Union and Other Protected Concerted Activities made by Fernando Magalhaes to Employees on or about February 25, 2016

Diego Hernandez (Hernandez) has been an employee of Jamaica Car Wash since 2005. He is employed to perform all aspects of car washing and drying. Hernandez is also a shop steward with the Union. He says he deals with Palacios for any labor management problems. He indicated there have not been many labor issues at the car wash since he has been a shop steward.

Hernandez knows Castillo from work when Castillo first started working there in December 2015. He is aware that Castillo was discharged because he received a telephone call from

⁷ Palacios was not at work the morning of December 24 and exchanged texts with Castillo while he was departing from the hospital where he was receiving medical treatment.

Castillo towards the end of December. Castillo told Hernandez that Palacios said to him that there was no more work: “No more work, because it’s raining and if you can get another job, go ahead” (Tr. 247). Hernandez told Castillo that he was going to refer Castillo’s discharge to the union representative. Hernandez promised Castillo that he would talk to the union representative. The phone conversation lasted approximately 10 minutes (Tr. 248).

On February 25, 2016, Hernandez met with Magalhaes, Assistant Manager Donald Montezuma, Palacios, and another worker. The meeting was called by Magalhaes in reference to a petition that was signed by workers at another car wash regarding the discharge of Castillo. Hernandez was instructed to attend the meeting by Magalhaes.

The petition (GC Exh. 8) was signed by 19 workers from the other car wash and stated the following:

To Fernando Magalhaes:

We the undersigned, are union workers from Jomar Car Wash. We were very upset to hear reports that you and your manager have been violating the rights of union workers at Sutphin Car Wash. We would have thought that as a progressive, employer, you would ensure that no workers are abused. We would never expect that you would interrogate or threaten workers, and hope that you will take all steps necessary to make sure that this does not happen. Furthermore, we ask that you immediately re-hire Yovani Castillo.

Hernandez said that the petition was delivered to Magalhaes by a worker at another car wash.⁸ Hernandez said that the petition was not written by the Union. Hernandez did not know who wrote the petition or who sent it to the Respondent (Tr. 256).

At the February 25 meeting, Magalhaes spoke first and told Hernandez that the discharge was untrue and that Castillo just didn’t show up at work. Magalhaes told Hernandez that he “needed my workers. He didn’t show up” (Tr. 257).

On cross-examination, Hernandez testified that he believed the meeting was called regarding the discharge of Castillo (Tr. 259). Hernandez told Magalhaes that he did not know anything about the termination except for what Castillo had said to him over the phone. When questioned about his phone conversation with Castillo, Hernandez said that the exact words were “manager told him he could get another job” (Tr. 261) and also that Palacios had called Castillo and said “...that the weather is bad. There is no more work. And if I need you, I call you back” (Tr. 262).

According to Hernandez, Magalhaes also told Hernandez that a union representative by the name of Nicolas was messing with him and wasting his time because he said that Respondent had fired Castillo and that was not true. Magalhaes also stated that two guys were “fucking with him” and he was referring to Santos and Hector, who were wasting his time by talking too much. Hernandez believed that Magalhaes was mad because

Santos, Hector and Nicolas were speaking the truth.⁹ At the time of the meeting, Santos and Hector were no longer working at the car wash. The meeting ended at this point, when Hernandez asked to buy coffees for everyone.

F. The Alleged Interrogation of Employees by Supervisor Israel Palacios About the Union Activities of Other Employees on or about February 28, 2016

The General Counsel alleges in the complaint that Gomez was interrogated by Palacios in his car when Palacios ostensibly instructed Gomez to assist him in running some work-related errands.¹⁰

Gomez testified that he was working at the car wash on February 28, 2016, when Palacios called him over to run some work errands with him in Palacios’ car. During the trip, Gomez was told by Palacios if he knew anything about Castillo and the Union because a union representative had come to the car wash on the very same day that Castillo was allegedly discharged. Gomez was asked by Palacios why the Union would support Castillo when he was no longer a worker at the car wash. Gomez replied that he did not know (Tr. 122, 123; 146–147).

The Respondent again denied this allegation. Palacios testified and maintained that he never spoke to Gomez about the Union after their December 3 job interview (Tr. 381).

G. The Alleged Section 8(a)(3) Violation When on or About February 25, 2016, The Union Sought Reinstatement and the Respondent Refused to Reinstatement Yovanni Castillo to his Former Position

In the amended complaint paragraphs 10(a) and (b), the counsel for the General Counsel alleges that during the February 25, 2016 meeting, the Union, through the union shop steward Hernandez, sought reinstatement for Castillo. The Respondent, through Magalhaes, refused to reinstate Castillo to his former position (GC Exh. 7).

As noted above, Hernandez testified that on February 25, Hernandez met with Magalhaes, Assistant Manager Donald Montezuma, Palacios and another worker. The meeting was called by Magalhaes in reference to a petition that was signed by workers at another car wash regarding the discharge of Castillo. Hernandez said that the petition was sent to Magalhaes by the Union. Hernandez did not know who wrote the petition or who sent it to the Respondent. The petition was delivered by one of the workers from the other car wash to the Respondent’s facility.

Magalhaes spoke first and told Hernandez that the discharge was untrue and that Castillo just didn’t show up at work. Magalhaes told Hernandez that he “needed my workers. He didn’t show up” (Tr. 257). Magalhaes testified that he did not

⁸ At the hearing, the counsel for the Union made it clear that the February 25 meeting was not a meeting with union participation (Tr. 253–254). Hernandez did not know why he was called to the meeting.

⁹ Nicholas is a union official. Hernandez did not know his surname. Nicholas was not present at the February 25 meeting and was not involved in the drafting or delivery of the petition regarding the discharge of Castillo. Nicholas was not called by the General Counsel as a witness. Santos was also a union shop steward working with Hernandez (Tr. 259).

¹⁰ Although the complaint alleges that “employees” were interrogated by Palacios, it is clear that only Gomez was allegedly interrogated at this event.

call Castillo back to work because Castillo was never discharged. Magalhaes insisted that he inquired as to Castillo's whereabouts with the shop steward Hernandez and with a few other workers that lived in Castillo's general neighborhood. The Respondent contends that no one was able to reach Castillo (Tr. 334-337).

H. The Johnnie's Poultry Section 8(a)(1) Violation When the Respondent Allegedly Interrogated Employees Regarding Their Union Activities and Other Protected Concerted Activities of Yovani Castillo in June 2016

The counsel for the General Counsel alleges that during the pendency of this hearing, an employee, Eduardo Vasquez, testified that Magalhaes called a meeting with several employees 2 weeks before the hearing with regard to the possibility of their testimony at the trial. The counsel for the General Counsel alleges that Vasquez and others were not told by Magalhaes that they had a choice of whether they wanted to testify and they were not told that there would be no consequences regardless of how they testified.

The allegations in the amended complaint paragraph 7 implicates the Board's seminal decision in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied on other grounds, 344 F.2d 617 (8th Cir. 1965). In that case, the Board articulated safeguards necessary to privilege an employer from 8(a)(1) liability where either the employer or its counsel chooses to question employees on matters involving their Section 7 rights in preparation for a hearing on an unfair labor practice complaint.

Vasquez testified that Palacios asked him to come testify about a week or two before the proceedings. Vasquez and other workers met with Magalhaes at the car wash. The meeting was about the discharge of Castillo. Vasquez testified that Magalhaes and Palacios were present at the meeting along with other employees. During the meeting, Magalhaes told everybody present that he was upset that Castillo claimed he had been terminated. Magalhaes told Vasquez there would be a court case over the discharge and asked Vasquez to testify (Tr. 366, 370).

Vasquez denied that Magalhaes stated at the meeting that some workers were saying that they were threatened by Magalhaes (Tr. 371). Vasquez stated that Magalhaes did not ask questions of the employees regarding the discharge at the meeting (Tr. 371). Vasquez stated that Magalhaes told him the following:

He talked to us about the case because the young man that we know, we know he was not fired from the job. He left the job himself, but he was saying that he was fired from the job, but it's not true. He stopped working because he found a better job. He wanted witnesses because no one the job – many people leave without saying anything. Many leave and they just come back to get paid and that's what happened to him. He disappeared without saying anything (Tr. 372).

Assistant Manager Montezuma testified that he was told by Magalhaes to attend the hearing "a couple of weeks ago" (Tr. 293). He said there was a meeting with Palacios, Henrique Barreno, Jose Alonso, Ricardo Estrada and Eduardo Vasquez. The employees were informed by Magalhaes that "We have to

answer to a problem that he (Magalhaes) was accused for firing a guy" (Tr. 294).

Montezuma said it was optional to attend the trial (Tr. 294). He testified that "He (Magalhaes) didn't[sic] force anyone" (to attend). Magalhaes only told Montezuma to "tell the truth regarding what happened to Castillo" (Tr. 298). Montezuma said that Magalhaes repeatedly "told us to tell the truth" (Tr. 300).

I. The Testimony of Fernando Magalhaes

Fernando Magalhaes testified and described himself as the general manager for Jamaica Car Wash. In that role, he makes decisions for the car wash, and there is nobody who can overrule his decisions. He is aware of the Union's presence and had negotiated the contract with the Union. He claims to have a very good relationship with the Union. He said there have been one or two grievances filed by the Union, but both were resolved without arbitration. He said a union representative would visit one to three times a month at the car wash to talk with the workers. He described his exchanges with the union representative as cordial.

Magalhaes had heard about the job interview when Castillo and Gomez were hired, but he was not present at the interview and did not recall what was told to him about Castillo. Magalhaes testified that Palacios and Montezuma were responsible for the hiring of new employees. Magalhaes further testified that he never exchanged words, outside of greeting Castillo when he noticed him working at the car wash.

Magalhaes testified that there was a lot of rain in the last 2 weeks of December. Magalhaes testified that the work schedule is posted every Sunday for the workers and that "99% of the time" he reviewed the schedule (Tr. 316). Magalhaes testified that he saw Castillo's name on the schedule for the entire month. Magalhaes noticed at some point that Castillo was no longer working at Jamaica Car Wash. Magalhaes testified that he thought Castillo ceased working because of the inclement weather. Magalhaes believed that Castillo communicated to the car wash like every other employee, by calling in. Magalhaes testified that it's the policy of Jamaica Car Wash that the workers would call when the weather is bad to call find out if there is work. In addition, if the weather forecast calls for rain on the following day, the workers were told to call to see if there was work, but to call no later than 9 a.m.

In terms of who makes the phone calls, Magalhaes said: "Most of the time it's both ways, but mainly 90% of the time it's the employees call. We only call if we are missing, lacking employees" (Tr. 319). Magalhaes testified that he "also looked at the schedule that two-three weeks went by and he [noticed that Castillo] wasn't in the schedule" around January 5 or 6 (Tr. 319). When he inquired, Magalhaes testified that Palacios told him that Castillo used to always call and then stopped calling. Magalhaes testified that Palacios had followed up with his cousin (Gomez) and was informed by Palacios that Castillo's cousin told Palacios that Castillo already had a job somewhere else.

Magalhaes stated that he asked Palacios to call the shop steward, Diego Hernandez, to find out and clarify as to what happened to Castillo. Magalhaes said this was done in response to receiving a petition with "21 signatures collected from the

workers stating—with the same union, stating that I was bad person” from another car wash (Tr. 319).

Magalhaes denied that he attempted to get rid of the Union by talking to the employees to get rid of the Union. Magalhaes stated that it would not help him to get rid of the Union because he tries to work with the Union so the business can flourish. Magalhaes had no idea whether Mr. Castillo supported the Union, and claimed not to be interested. Magalhaes further explained that he does not care if any of the workers support the Union and that the Union could work to his benefit, for instance if he has to discipline someone or when someone is out sick (Tr. 337).

Magalhaes denied firing Castillo and did not give permission to Palacios or Montezuma to fire him or anyone else. Magalhaes testified about receiving a petition from workers at another car wash requesting the reinstatement of Castillo. Magalhaes testified that the petition stated Castillo was unjustly terminated, and desired his reinstatement. Magalhaes felt the petition was untrue, especially because the petition came from employees from a different car wash. After receiving the letter, Magalhaes decided to hold a meeting with Shop Steward Hernandez and three to five other workers, including Palacios and Montezuma because he was upset with the false accusations. At this meeting, Magalhaes stated that Castillo was not fired. Magalhaes did not call Castillo back because Palacios told him that Castillo was already working somewhere else. Magalhaes testified he did not call Castillo.

Q. Can you explain why you didn't call?

A. Yes, because I asked the shop steward and he said no. We went to look three, four, five other guys who worked there, because everybody lives around where he lives and his cousin lives in the same business. So to ask him what happened? Because we didn't fire him (Tr. 336, 337).

J. Credibility

The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Because of numerous conflicts among the testimony given by Palacios, Castillo, Gomez, Hernandez, Magalhaes, Montezuma and Diego Echeverry, a decision must be made as to which parts of the sharply differing accounts are credible. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the records as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all of all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, *supra*.

The Respondent argued that the testimony of Castillo and Gomez was not credible. In particular, the Respondent main-

tains that Gomez was untruthful in his testimony regarding the antiunion animus comments made by Palacios in their mid-December meeting and when they were running a work errand in Palacios' car. The Respondent maintains that the NLRB charge was filed to extort money from the Respondent. In that regard, the Respondent called Diego Echeverry (Echeverry) as a witness.

Echeverry works for a landscaping company and on occasions, he would work on his own doing landscaping work. Echeverry had previously worked at the Respondent's car wash in August to November 2015 and again at the end of January to March 2016. Echeverry testified that he knows Gomez from working at the car wash (Tr. 386). Echeverry has not previously hired Gomez to do landscaping work but testified that he knows Gomez to be a good worker and does his job well (from working at the car wash) and believed him to be trustworthy (Tr. 479).

Echeverry testified that he had called Gomez on June 18, 2016 (Saturday) to assist him in doing some landscaping work on June 19 (Sunday). Gomez agreed to work with Echeverry and the two worked all day on June 19, but were unable to complete the job. Echeverry testified that he had a conversation with Gomez during a lunch break. Echeverry asked if Gomez could work for him on Monday. Gomez allegedly replied that he could not because he was scheduled to be a witness at a court proceeding and that he was going to lie, but did not state about what and against whom (Tr. 390, 467, 468).

Echeverry said that he spoke to Gomez Sunday (June 19) evening if Gomez could finish the job on his own the next day, which would be Monday. The Respondent alleges that Gomez then told Echeverry that

...it wasn't possible because he (Gomez) had to attend to defend his cousin with a version where they were going to get some money. I have to go as a witness to the court to defend my cousin, to help my cousin and that's why he was unable (to work). But also, he expressed to me that what he was going to say was to get some money with his cousin (Tr. 388).

Echeverry said that he went to have his pickup truck cleaned at the Respondent's car wash after his conversation with Gomez. At the car wash, Echeverry was talking to Montezuma and Montezuma asked who was working on the landscaping job with Echeverry. When Echeverry replied that it was Gomez, Montezuma told Echeverry about the NLRB hearing. Echeverry testified that he volunteered to Montezuma that he was willing to testify what Gomez had told him while at work.

Echeverry was recalled as a witness. Echeverry insisted that his conversation with Gomez about attending the NLRB proceeding occurred while they were taking a break for lunch during their landscaping work on June 19, 2016 (Tr. 389, 390). It is alleged that in response to Echeverry's inquiry as to whether he was going to work, Gomez said "I told him exactly I'm going to go give a statement in court" (Tr. 441, 442). Gomez testified

He asked me whether I was going to work or what. I told him exactly I'm going to go give a statement in court." That "I am going to have to go to court to testify." And he said, why, what happened, did you get in trouble. And I said no, I am

going to go and testify for a friend (Tr. 442).

Further, Echeverry maintained there was a phone conversation with Gomez that occurred on Monday (June 20). Echeverry wanted to confirm with Gomez if he would be able to work for him on Tuesday. It is alleged that Gomez again repeated that he was going to get some money with his cousin by lying in court. Echeverry warned Gomez not to get into trouble (Tr. 470, 473).

Gomez was also recalled as a witness. Gomez testified that Echeverry picked him up on Sunday morning around 7:30. Gomez denied he had any conversation regarding his testimony at the NLRB or any court proceeding during their ride to the work site, at work, during their lunch break or during the ride home. Gomez said that he arrived at home around 6:10–6:20. Gomez testified that he had no conversation with Echeverry regarding his testimony as a witness with Echeverry and that the next conversation he had with Echeverry occurred on Monday, June 20. Gomez stated that they did not complete the job on June 19 and he was asked by Echeverry towards the end of the work day if Gomez could work on Monday (Tr. 428–441). Gomez replied in the negative. Gomez said that Echeverry called him on Monday around 6:18 p.m. and asked if Gomez could work for him on Tuesday. Gomez replied that he already has a regular job in construction. On my examination, Gomez testified he had a conversation with Echeverry in the evening on Sunday, June 19. During this conversation, Gomez corroborated the testimony of Echeverry when he asked Gomez if he was available to work for him on Monday (Tr. 461).

Gomez denied mentioning his cousin's name and denied mentioning the car wash. Gomez denied that he told Echeverry he was going to lie in court. He denied mentioning the Union (Tr. 443–444).

Upon my review, I find that Echeverry was not credible regarding his testimony of the events on June 19 and 20. Echeverry initially testified and confirmed as a recalled witness that Gomez told him he could not work on Monday because he was going to court to lie on behalf of Castillo. Gomez denied making that statement.

Echeverry testified that this conversation occurred during a lunch break on June 19 while they were working together. Echeverry initiated the conversation by asking Gomez if he could work on Monday to finish the Sunday landscaping job. However, I do not find it credible for Echeverry to ask whether Gomez could work on Monday since it would be unknown to either Echeverry or Gomez during their lunch break if in fact the landscaping job could be completed by the end of the day. At best, if this conversation had occurred, it would have been at the end of the work day. As such, I credit the testimony of Gomez on this point when he testified that he was only asked to work towards the end of the work day on Sunday and Monday evening.

I also find that it was not credible that Gomez would tell Echeverry that he was going to lie in court on behalf of Castillo. Gomez already knew that Echeverry has worked and continued to occasionally work at the car wash. Consequently, it would be foolish on the part of Gomez to tell him or anyone associated with the car wash that he would lie at the NLRB

trial. Gomez did not know Echeverry and had only worked that one occasion with him on the landscaping job. There is no reason for Gomez to confide in Echeverry about his testimony at the hearing.

In establishing that the conversation between Echeverry and Gomez did not occur as argued by the Respondent, I also note that my credibility determination on this point does not mean that Gomez and Castillo were credible in the remaining allegations in this complaint. As noted above, “. . . Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness’ testimony.” *Daikichi Sushii*, above.

Discussion and Analysis

A The Alleged 8(a)(1) Violations of the Act

The counsel for the General Counsel argues that there were multiple 8(a)(1) violations of promises of benefits, threats, and interrogations in its efforts to avoid hiring union supporters to the car wash. The counsel for the General Counsel believes that Castillo was a supporter of the Union targeted by the Respondent to eliminate.

Section 7 of the Act guarantees employees the right “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” See *Brighton Retail, Inc.*, 354 NLRB 441, 447 (2009). Section 8(a)(1) of the Act provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7.

In analyzing a Section 8(a)(1) charge, “[t]he test is whether the employer engaged in conduct which, it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act.” *American Freightways Co.*, 124 NLRB 146, 147 (1959). The main case on this subject is *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), in which the Supreme Court stated:

It is well settled that an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union so long as the communications do not contain a “threat of reprisal or force or promise of benefit.” He may even make a prediction as to the precise effect he believes unionization will have on the company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control. Because the test for legality may depend on a statement’s context and whether it is based on “objective fact,” it is therefore possible for the same words to be either legal or illegal

8(a)(1) violations do not turn on the employer’s motive or on whether the coercion succeeded or failed. *Gissel Packing Co.*, above; *Almet, Inc.*, 305 NLRB 626 (1991).

1. The Respondent did not violate 8 (a)(1) Regarding the December 3 Job Interview and at the Mid-December Meeting

The General Counsel alleges that the Respondent, on or about December 3, threatened Castillo and Gomez that supporting the Charging Party Union would be futile; promised them raises and additional work hours if they help to oust the Union; threatened them with termination if they decided to support the Union and instructed them not to speak to any union representatives. The Respondent denied these allegations and maintained that these allegations were fabricated by Castillo and Gomez. The Respondent believes that the allegations were made by Castillo and Gomez for personal financial gains by extracting money from the Respondent. The General Counsel does not dispute that Palacios made these threats and promises only to Castillo and Gomez and no other workers during the December timeframes alleged in the complaint.

It has long been settled that an employer, and by extension, the employer's agents and supervisors may "communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). As stated in *NLRB v. Neuhoff Bros. Packers, Inc.*, 375 F.2d 372, 374 (5th Cir. 1967):

For despite the effort of management to keep its unsophisticated advocates within the narrow lines allowed . . . its supervisors, whether "out of zeal, ignorance, or otherwise * * * in championing the antiunion cause," made statements . . . which were outright, not subtle, transgressions of Section 8(a)(1). These included threats to discontinue bonuses, to fire union adherents, and persistent questions about known union meetings leading the employees to believe that they were under surveillance and their union activities known to management.

The questioning of job applicants concerning their union membership or sympathies long has constituted an unlawful interrogation. See, e.g., *Facchina Construction Co.*, 343 NLRB 886, 886 (2004); *Zarcon, Inc.*, 340 NLRB 1222, 1222 (2003). The Board recognizes that, under the totality of the circumstances test, an applicant may understandably fear that any answer he might give to questions about union sentiments posed in a job interview may well affect job prospects. *Active Transportation*, 296 NLRB 431, 431 fn. 3 (1989).

Indeed, if such comments were made by Palacios, a supervisor and agent for the Respondent, about the Union and their employment status, Palacios' statements to Gomez and Castillo would constitute unlawful threats and promises. See *DHL Express, Inc.*, 355 NLRB 1399, 1402-1405 (2010) (employer violated Section 8(a)(1) by informing employee that, if the union prevailed in the upcoming election, he would be less flexible and be compelled to more strictly enforce tardiness policy); *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1084 (2004) (unlawful for employer to tell employees that the presence of a union would cause it to be less lenient and strictly enforce break times rules); *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 450 (1995) (employer violated Section 8(a)(1) by informing employees, while waiving proposed collective-bargaining agreement, that shop would be run "strictly

by union rules"); *Treanor Moving & Storage Co.*, 311 NLRB 371, 375 (1993) (unlawful for employer to tell employees that it "used to let you guys get away with this kind of stuff" but "now you are union and you guys are playing your game and the company is going to have to play by their game").

Castillo and Gomez were interviewed for a job at the car wash on or about December 3 when Palacios allegedly made his antiunion comments. Palacios allegedly asked both Castillo and Gomez whether they knew what a union was. Castillo said he was unfamiliar with the concept of a union. Castillo asked about the union benefits and break time. He did not ask anything else about the Union. Castillo maintains that Palacios then started cursing about the Union; referred to the Union as "shit" and that the Respondent wanted to get rid of the Union when the collective-bargaining agreement was set to expire in October 2016. According to Castillo, Palacios promised a salary increase to the workers once the Union is removed. Gomez also recalled that Palacios asked him if he knew what a Union was. Gomez replied he did not know and Palacios cursed the Union and told them that he did not want a Union and that the Union was not good for anything. Gomez recalled that Palacios said the Union "...was not good for anything," and referred to the Union with derogatory words. According to Gomez, he recalled that Palacios said to them that "the owner had said that if in October they got rid of the Union; he was willing to raise the salary and give more hours." Gomez failed to recall if anything else was said about the Union (Tr. 118, 119).

According to Palacios, during their job orientation, he mentioned the Union to Castillo and Gomez. Palacios testified that Castillo and Gomez said they did not know what a union is. Palacios proceeded to explain the concept of a union to them.

Palacios denied criticizing the Union in front of Castillo and Gomez. Palacios confirmed that he mentioned the Union to Castillo and Gomez. Palacios testified he has no problems with the Union and has observed a representative from the Union speak to his workers on occasions. Palacios recalled only one dispute with the Union regarding the non-payment of a bonus during a holiday. Palacios recalled that the bonus issue was resolved to the satisfaction of the Union.

Palacios testified that his interview with Castillo and Gomez lasted about 10 minutes on December 3. He denied calling the Union "shit"; denied saying that "the Union was good for nothing" or that he wanted to get rid of the Union by October to Castillo or Gomez. He stated that he never had a problem with the Union. He also denied stating that he would increase everyone's salary once the Union was gone. (Tr. 378-381).

It is further alleged by the General Counsel that in mid-December, Gomez had a conversation with Palacios regarding Castillo.¹¹ Gomez failed to recall the exact date of their conversation. The conversation lasted about 10 minutes and no one else was present at the start of the meeting. It is alleged that Palacios interrogated Gomez regarding if he knew anything about Castillo's support for the Union. Gomez said he did not

¹¹ As noted, although the complaint alleges that employees were threatened for their support of the Union and promised with benefits for not supporting the Union in mid-December, the only employee actually identified by the General Counsel was Gomez.

know. Palacios allegedly told Gomez that he was going to fire Castillo because Castillo supported the Union and because he did not want any more people to support the Union. Palacios allegedly repeated that he wanted to get rid of the Union (Tr. 120). Palacios apparently told Gomez he didn't want any more people to support the Union because another employee had told Palacios that Castillo was supporting the Union (Tr. 140). Palacios also allegedly pleaded with Gomez that he should not talk to the shop steward. At this point in the conversation, Palacios also repeated that the owner was willing to give more work hours and a higher salary if the workers got rid of the Union.

Palacios denied that he had a conversation with Gomez in mid-December. Palacios credibly testified that he never spoke or discussed the Union with Gomez or Castillo after their initial job interview on December 3.

Upon my close review of the testimony of Castillo and Gomez and contrasting the same with the testimony provided by Palacios, Echeverry, and Vasquez, I do not credit the testimony of Castillo and Gomez as credible that antiunion animus comments were made by Palacios on or about December 3 and in mid-December 2015.

In my opinion, I find the General Counsel's theory that the Respondent wanted the support of Castillo and Gomez in order to oust the Union and promised them raises and additional work hours as without any merit.

First, in accordance with the collective-bargaining agreement, Castillo and Gomez became members of the bargaining unit and represented by the Union when they were hired on December 3 (GC Exh. 2). Neither Castillo nor Gomez reported these antiunion statements made by Palacios to the shop steward or to a union representative, who reportedly visited the car wash premises at least twice a month. It would have behooved these two individuals to report such alleged transgressions to the Union to strengthen their own position if in fact they were threatened about their support of the Union or promised more money and work hours.

Second, the Respondent's car wash employs over 60 members of the bargaining unit. I would again question the validity and credibility of the antiunion animus statements when Castillo and Gomez were the only ones that heard the statements being made by Palacios. If the Respondent truly was hell-bent in getting rid of the Union by October 2016, it would have been more likely than not that other employees would have also heard the same antiunion animus statements being made. It simply is not credible that Palacios would have made these antiunion comments of promises and threats to two job applicants who had no idea of the concept of a union during their interview when promises of additional work and money for ousting the Union would have more of an impact if made to the tenured employees.

Third, it is without dispute that the Union and the Respondent had and continue to have a reasonable working labor-management relationship. Hernandez, the union shop steward, never testified to any on-going labor problems at the Jamaica facility. Magalhaes and Palacios testified to a single incident involving a holiday bonus not allegedly given to the workers that was subsequently resolved with the Union. Aside from this

single incident, the record is void of any ongoing labor conflicts between the Union and the Respondent. The counsel for the General Counsel argues that the Respondent wanted to eliminate support for the Union for the upcoming collective-bargaining negotiations when the contract expires in October 2016. However, that is purely speculative on the part of the General Counsel and no evidence was proffered to show anti-union animus other than the self-serving testimony of Castillo and Gomez.

Fourth, I find and credit the testimony of Vasquez. Vasquez is a union member and identified Palacios as his supervisor. Vasquez denied hearing Palacios talk about the Union in a derogatory manner in November and December 2015 to him or anyone else. Vasquez denied that Montezuma, Palacios or Magalhaes promised him money or raises if the Union was removed. Additionally, he denied hearing any similar conversations between those three and any other coworkers. Vasquez denied being promised additional hours for getting rid of the Union or overhearing management making any similar statements to his coworkers. Vasquez denied being threatened with termination if he supported the Union. Vasquez denied being offered more money if he helped to get rid of the Union or overhearing management make any similar statements to his coworkers. Vasquez denied being promised anything if he took a position against the Union or overhearing management make any similar statements to his coworkers. Vasquez denied being instructed not to speak to the Union or overhearing management make any similar statements to his coworkers. Vasquez denied ever being threatened by Palacios or Magalhaes regarding his support for the Union.

Fifth, I find that Gomez lacked credibility in his testimony regarding his mid-December 2015 conversation with Palacios. Gomez testified that Palacios allegedly told him that Castillo was fired for supporting the Union. Gomez also testified that Palacios pleaded for him not to talk to the union shop steward. However, Gomez never testified why Palacios believed Castillo supported the Union and there is no evidence presented by the General Counsel that Castillo actually supported the Union. Castillo never testified that he engaged in any concerted or protected activity during his short 1-month tenure at the car wash. Hernandez, the union shop steward, never testified that he engaged in any discussions about the Union with Castillo or Gomez. Gomez never reported to Hernandez that he was told by Palacios not to talk to the Union. There is simply a paucity of any evidence to support the allegation in the complaint that Palacios discharged Castillo because he supported the Union or that Gomez was instructed not to speak to the Union.

Sixth, Gomez who was also allegedly subjected to the same antiunion comments made by Palacios was never disadvantaged. Gomez worked at the car wash without incident until he resigned in May 2016. Again, it would behoove me to question why Gomez was not allegedly discharged when he was also hired at the same time as Castillo and allegedly subjected to the same antiunion statements by Palacios.

Accordingly, I recommend the dismissal of these allegations in the complaint.

2. The Respondent did not Violate Section 8(a)(1) of the Act In Regards to the Alleged Threats to Employees on or About February 25, 2016

The amended complaint alleges that on or about February 25, 2016, the Respondent, by General Manager Fernando Magalhaes, at its Jamaica facility, threatened employees with unspecified reprisals for engaging in union and other protected concerted activities.

The General Counsel maintains that the Respondent, through Magalhaes, at a meeting held on or about February 25, 2016, threatened employees for engaging in union and other protected concerted activities. The Respondent maintains that the meeting was called by Magalhaes to defend his position that Castillo was never discharged as alleged in a petition that demanded his reinstatement signed by employees at another car wash facility.

At the February 25 meeting, Magalhaes spoke first and told Hernandez that the discharge was untrue and that Castillo just didn't show up at work. Magalhaes told Hernandez that he "needed my workers. He didn't show up" (Tr. 257).

According to the testimony of Hernandez, Magalhaes told Hernandez that a union representative by the name of Nicolas was messing with him and making him lose and waste time because he said that Respondent had fired Castillo and that was not true. Magalhaes also stated that two guys were "fucking with him" and he was referring to Santos and Hector, who was wasting his time by talking too much. Hernandez believed that Magalhaes was mad because Santos, Hector and Nicolas were speaking the truth.¹² At the time of the meeting, Santos and Hector were no longer working at the car wash. The meeting ended at this point, when Hernandez asked to buy coffees for everyone.

The Board has established an objective test for determining if "the employer engaged in conduct which would reasonably have a tendency to interfere with the free exercise of employee rights under the Act." *Santa Barbara New-Press*, 357 NLRB 452, 476 (2011). This objective standard does not depend on whether the "employee in question was actually intimidated." *Multi-Ad Services*, 331 NLRB 1226, 1228 (2000), *enfd.* 255 F.3d 363 (7th Cir. 2001). Rather, whether the statements are a threat is viewed from the objective standpoint of the employee, over whom the employer has a measure of economic power. See *Mesker Door, Inc.*, 357 NLRB 591, 30 595 (2011); *Inn at Fox Hollow*, 352 NLRB 1072, 1074 (2008); See also Section 8(c) of the Act (stating that the "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act . . . , if such expression contains no threat of reprisal or force or promise of benefit.").

Upon my review, I find that the Respondent did not engage in conduct which would reasonably have a tendency to interfere with the free exercise of employee rights under the Act. First, the statements made by Magalhaes regarding two employees were not threats and did not connote any unspecified reprisals. Second, Magalhaes only referenced two employees who talked too much and are no longer working at the car wash. Third,

Hernandez did not testify that the two employees were talking too much about union matters or of terms and conditions of their employment. Merely referring to employees talking too much does not chill or interfere with their Section 7 rights.

Accordingly, I recommend the dismissal of this allegation in the complaint.

3. The Respondent did not Violate Section 8(a)(1) with Regards to the Alleged Interrogation of Gomez in Palacios' Car on or About February 28, 2016

The General Counsel alleges that Gomez was interrogated by Palacios in his car when Palacios ostensibly instructed Gomez to assist him in running some work-related errands.¹³ The Respondent asserts that Palacios never spoke to Gomez about the Union after his December 3 job interview.

Gomez testified that he was working at the car wash on February 28, 2016, when Palacios called him over to run some work errands with him in Palacios' car. Only Gomez and Palacios were in the car and no other witnesses corroborated this conversation. During the trip, it is alleged that Palacios interrogated Gomez about his knowledge regarding Castillo and the Union because a union representative had come to the car wash on the very same day that Castillo was allegedly discharged. Gomez testified that the interrogation occurred for 40 minutes in Palacios' car. However, the entire substance of this alleged interrogation (Tr. 122, 123) was as follows:

Q: And where were you for that conversation?

A: I was working, but Mr. Israel called me to his vehicle.

Q: Did you get into the vehicle?

A: Yes.

Q: Were you going somewhere?

A: Yes, to work, to buy pans for the car wash.

Q: And what, if anything, did Mr. Palacios say to you about Yovanni's termination?

A: He didn't say anything, but he said if I knew—if I knew something about the Union and Mr. Castillo because the Union had come to the car wash the very same day that my cousin was fired.

Q: During this conversation did the topic of Yovanni's support for the Union come up?

A: Yes.

Q: And what, if anything, did he say?

A: He said if he was still with the Union why was the Union fighting for his case if—if he was employee of the car wash? (Gomez' testimony was incorrectly translated-and his testimony reinterpreted as follows:)

A: He told me why the Union had come asking about his dismissal if he wasn't a worker of the car wash anymore?

Q: Did you respond?

A: I said I didn't know anything.

Q: How long did that conversation last?

A: About 40 minutes.

An unlawful interrogation is one which reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act,

¹³ As noted, although the complaint alleges that employees were interrogated, the General Counsel concedes that the only employee allegedly interrogated was Gomez.

¹² As noted, Nicholas and Santos were union officials.

under the totality of the circumstances. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), *affd. sub nom Hotel Employees & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000), *enfd.* 255 F.3d 363 (7th Cir. 2001).

In specifically assessing whether a remark constitutes a threat, the appropriate test is “whether the remark can reasonably be interpreted by the employee as a threat.” *Smithers Tire*, 308 NLRB 72 (1992). Further, “It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer’s motive or on whether the coercion succeeded or failed.” *American Tissue Corp.*, 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, above). In determining whether questioning of an employee about protected activity is lawful, the Board considers whether, under all the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise rights guaranteed by the Act. *Rossmore House*, above; *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); See also *800 River Rd. Operating Co. LLC v. NLRB*, 784 F.3d 902, 913 (3d Cir. 2015). Factors considered under this analysis include the identity of the questioner, the place and method of the interrogation, the background of the questioning, and the nature of the information sought. *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1295 (2009), *affd.* and incorporated by reference in 357 NLRB 633 (2011), *enfd. sub nom. Mathew Enterprise, Inc. v. NLRB*, 771 F.3d 812 (D.C. Cir. 2014).

Upon my review of the record, I find that the counsel for the General Counsel failed in her burden of proof that there was an unlawful interrogation. I find that the alleged interrogation in Palacios’ car never occurred. First, there has been no testimony to corroborate this alleged interrogation. The union shop steward, Hernandez, never testified that he made any inquiries on the day that Castillo was allegedly discharged in order to corroborate the reason that Gomez said was the reason that Palacios wanted to meet with him. The counsel for the General Counsel never called the unidentified union representative that was referred by Hernandez and allegedly went to the car wash to inquire about Castillo’s discharge. Indeed, neither Hernandez nor any other union representatives were involved with the circumstances of Castillo’s discharge until almost 2 months later on February 25, when he was called to a meeting by Magalhaes regarding the petition.

Gomez never testified that he reported this alleged interrogation to Hernandez even though Gomez knew that Hernandez had inquired about the circumstances of Castillo’s employment with management just 3 days earlier at the February 25 meeting. Gomez never testified that he felt intimidated or coerced or even believed that his job was in jeopardy when Palacios spoke to him in the car. Finally, it is difficult to believe and credit any of Gomez’ testimony when the entire substance of his alleged interrogation consisted of less than a dozen questions but yet Gomez testified that the interrogation continued for over 40 minutes in Palacios’ car.

Accordingly, I find and conclude that Gomez was not inter-

rogated in Palacios’ car on or about February 28. I recommend that this allegation be dismissed.

B. The Respondent did not Violate Section 8(a)(3) in the Alleged Discharge of Yovanni Castillo

The General Counsel alleges that Respondent violated Section 8(a)(3) of the Act by terminating Castillo on or about December 24 for either expressing support or perceived to have given his support to the Union (GC Br. at 43). Respondent counters that Castillo was never discharged and that he simply abandoned his job.¹⁴

Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to the hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. In order to determine whether an adverse employment action violated the Act in this manner, the Board applies the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To establish unlawful discipline under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee’s union sympathies or activities were a substantial or motivating factor in the employer’s decision to take action against them. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving the employee’s union support or activity, employer knowledge of that activity, and animus against the employee’s protected conduct. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Proof of an employer’s motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004).

If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the employee’s union support or activities. *Wright Line*, above at 1089; *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004). Once the General Counsel has met his initial burden under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB at 280 fn. 12.

As with 8(a)(3) discrimination cases, the Board applies the *Wright Line* analysis to 8(a)(1) concerted activity cases that involve an employer’s motivation for taking an adverse employment action against employees. *Hoodview Vending Co.*, 359 NLRB 355 (2012), *reaffirmed* 362 NLRB No. 81 (2015); *Saigon Grill Restaurant, Inc.*, 353 NLRB 1063, 1065 (2009). The burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer’s decision to

¹⁴ The counsel for the General Counsel did not argue that Castillo’s discharge was an 8(a)(1) violation of the Act.

take adverse employment action against an employee was due to the employee's union or other protected activity.

In order to establish this initial showing of discrimination, the evidence must prove: (1) the employee engaged in protected concerted activities; (2) the employer knew of the concerted nature of the activities; and (3) the adverse action taken against the employee was motivated by the activity. Once the General Counsel has met his initial showing that the protected conduct was a motivating or substantial reason in employer's decision to take the adverse action, the employer has the burden of production by presenting evidence the action would have occurred even absent the protected concerted activity. The General Counsel may offer proof that the employer's articulated reason is false or pretextual. *Hoodview Vending Co.*, supra.

A *Wright Line* analysis is appropriate in this case because Respondent's motive is at issue. In order to sustain his initial burden of proof, the General Counsel must first prove that Castillo engaged in union or concerted protected activity and it was the substantial or motivating factor in Respondent's decision to discharge him. In order to ascertain whether the General Counsel has met his initial burden, the Board has relied on a number of factors. These include whether the alleged discriminatee has engaged in union or concerted conduct; whether the employer had knowledge of that activity; whether the employer demonstrated animus toward the employee activity; whether the animus was shown to have contributed to the decision to take adverse action against the employee; and timing of the adverse action in relation to the protected conduct. *Praxair Distribution, Inc.*, 357 NLRB 1048, 1048 fn. 2 (2011); *Central Valley Meat Co.*, 346 NLRB 1078, 1093 (2006); *Director, Office Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 268 (1994), clarifying *NLRB v. Transportation Management and Wright Line*, above.

If the General Counsel makes the required initial showing, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the protected concerted activity. The employer does not meet its burden merely by establishing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. See, e.g., *Bruce Packing Co.*, 357 NLRB 1084, 1086-1087 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015).

If the evidence establishes that the proffered reasons for the employer's action are pretextual—i.e., either false or not actually relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, regardless of the protected conduct. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003), citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

It should also be pointed out that this is a civil case and the General Counsel assumes a burden that is defined as requiring a "preponderance of the evidence." The counsel for the General Counsel is not required to prove her case beyond a "reasonable doubt." Nevertheless, in the present case, it is my belief that the counsel for the General Counsel has not met her burden of making a prima facie of discrimination. In my opinion, I find that the counsel for the General Counsel failed to meet her bur-

den under *Wright Line* to establish an 8(a)(3) violation of the Act.

The Board has long held that the timing of an adverse action shortly after an employee has engaged in protected activity will support a finding of unlawful motivation. See *Real Foods Co.*, 350 NLRB 309, 312 (2007); *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004). However, it has not been shown that Castillo had engaged in union or other concerted protected activity. Castillo never testified that he spoke to any union representatives and never testified that he engaged in any conversations with coworkers, management officials or even with his colleague, Gomez, about wages, benefits or other terms and conditions of employment. Castillo simply did not engage in any union or other protected activities. Union shop steward Hernandez testified that Castillo called him after Castillo's phone conversation with Palacios in late December and was informed by Castillo that he was told by Palacios that there "was no more work, because it's raining and if you can get another job, go ahead" (Tr. 247). However, this alleged conversation with the union official occurred after Castillo already believed he was discharged. Further, the reason that Castillo told Hernandez that he was allegedly fired was due to the inclement weather ("it's raining") and not because Castillo was engaged in union or other protected concerted activity.

Second, assuming that there was union or other protected activity engaged by Castillo, the Respondent never knew of any such activity. The basis for imputing knowledge of Castillo's union activity to the Respondent was from two conversations between Gomez and Palacios.¹⁵ In the first conversation occurring in mid-December prior to Castillo's alleged discharge, it is maintained that Gomez was called into Palacios' office and interrogated as to his knowledge of whether Castillo supported the Union (Tr. 119, 120), to wit.

Q: What, if anything, did Mr. Palacios say about Yovanni Castillo?

A: Whether I knew if he had anything to do with the Union or if he was supporting the Union.

Q: And did you respond?

A: I told him that I didn't know anything.

Q: Did he say anything else about Mr. Castillo during this conversation?

Yes.

Q: And what did he say?

A: He said that he was going to fire him from his job because he was told that he was supporting the Union and that he—because he didn't want more people to be in support of the Union because what he wanted was to get rid of the Union.

Assuming a prima facie case of an 8(a)(3) violation, I do not find that the reason for Castillo's discharge was because of any antiunion animus. Contrary to the position of the counsel for the General Counsel, there were no numerous contemporaneous 8(a)(1) violations to establish pretext. The Respondent and Union have a relatively benign labor-management relationship and it is not disputed that the few grievances filed were amica-

¹⁵ Castillo never testified as to his union activity or other protected activity while employed at the car wash.

bly resolved by the parties. It is well established that proof of an employer's discriminatory motivation may be based on evidence of the employer's contemporaneous commission of other unfair labor practices. See, e.g., *Amptech, Inc.*, 342 NLRB 1131, 1135 (2004), *enfd.* 165 Fed.Appx. 435 (6th Cir. 2006); *David Saxe Productions, LLC*, 364 NLRB No. 100 (2016). But that is not the situation in this complaint.

I have already discredited the testimony of Gomez that the alleged antiunion comments made during his job interview and his alleged interrogation in Palacios' car in February never occurred or did not occur as described by him. Here, again, I do not credit Gomez' testimony on this point. I find that there was simply no reason for Palacios to ask Gomez if he had any knowledge of Castillo's involvement or support for the Union because Gomez then continues and testified that Palacios already knew Castillo was supporting the Union and this was the reason for his discharge. It behooves me to question Gomez' credibility to the extent that if Palacios already was hell-bent to fire Castillo because he supported the Union, why would he even need to have a conversation with Gomez regarding Castillo's support for the Union? Further, Gomez shed no light to Palacios as to his knowledge (if any) about Castillo's alleged support for the Union. Consequently, the Respondent was still in the dark as to whether Castillo supported the Union. Finally, since Gomez was hired at the same time as Castillo and was allegedly subjected to the same threats and promises of benefits not to support the Union at their job interview, why didn't Palacios interrogate Gomez in their mid-December meeting about Gomez' own support for the Union?

The counsel for the General Counsel maintains that Castillo would have been a union member upon the expiration of his probationary period under the collective-bargaining agreement as the basis of Castillo's union activity (GC Br. at 44, 45). However, that would have been true also for Gomez and Gomez was not disciplined or discharged with Castillo.

The counsel for the General Counsel also argues that Respondent believed that Castillo was a Union adherent and that Palacios told Gomez that he was going to discharge Castillo because Palacios heard that Castillo supported the Union. The counsel for the General Counsel based this alleged violation solely on this mid-December conversation between Gomez and Palacios to establish that Castillo's Union activity was known to the Respondent (see, GC Br. at 44, 45). The counsel for the General Counsel argues that Gomez' testimony must be given credit that this conversation had in fact occurred with Palacios since Palacios did not deny making these antiunion comments in his testimony. Contrary to the General Counsel's position, the record shows that Palacios did in fact testify that he never spoke to either Castillo or to Gomez about any Union matters after their initial job interview on December 3, which, in my opinion, means that he never made such antiunion statements in conversation with Gomez.

The record further shows that Castillo was not discharged and that he simply, for whatever reason, did not return to work at the car wash. The counsel for the General Counsel argues that Castillo was discharged. However, there is nothing in the record to show any credible evidence that the Respondent specifically stated that Castillo was discharged. The allegation that

Castillo was discharged is based upon statements inferred in the recorded text and phone conversation. However, a close review of the recorded text and phone conversation between Palacios and Castillo is consistent with the Respondent's argument that Castillo was told there was no work at the moment. Upon examination by counsel for the General Counsel, Castillo testified that he understood this question as to mean that there was no work at the "moment" (Tr. 236). Subsequently, the counsel for the General Counsel tried to rehabilitate Castillo by arguing that nowhere does the word "moment" appeared in the recorded phone conversation and maintains that the transcript is an accurate reflection of the recorded phone conversation. It is clear that the word "moment" was not in the transcription (GC Exh. 5), but as to this point, I credit Castillo's testimony that he understood that there was no work only *at the moment*.

This finding that there was no work for the moment is further reinforced in the phone conversation, as follows:

Castillo: Oh, calling you about the messages that you have sent me and I understand that you told me that I am not going to work.

Palacios: Not now, because we are too much people, I have too much people and *no, no now*.

In the same phone conversation, Palacios reiterated to Castillo the following:

Palacios: Countryman, we will let you know later if we need you please [but] you know that the business is not good *now*.

Castillo: Ok, Thank you.

Palacios, in stating to Castillo that there was no work "now," is equivalent to Castillo's understanding that he was told there was no work at the "moment" by Palacios. My finding that Castillo understood that there was no work at the moment was reflected by the text recorded earlier on the same day:

Palacios: No, No, if you can look for another thing, look for it, my neighbor, look for it, do you understand me, because *now, we do not need you*.

In addition, undisputed testimony provided by Palacios and Magalhaes indicated that the car wash had a flexible policy for workers to find out if there was work available on a particular day due to inclement weather. The supervisor and the workers would exchange phone numbers so that each party may call each other if work is available. I credit the testimony of Magalhaes when he testified that 90 percent of the time, the workers would call to find work. In this situation, Castillo was aware of this policy and had previously called if work was available. On the last occasion, he did call in and was told that no work was available at the moment. Castillo simply stopped calling after December 24.

Furthermore, the Board has found that the Respondent's animus may be inferred from evidence that establishes the reasons it offered for Castillo's discharge were pretextual. See *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991), *enfd.* mem. 976 F.2d 744 (11th Cir. 1992). The counsel for the General Counsel maintains that Castillo could have been called back because the car wash needed workers after December 25. Gomez testified

that he observed a couple of new workers, which he described as “one was short, little, fat, and the other two were thin and tall” (Tr. 124) working at the car wash after December 25.

However, this testimony has served little purpose since Gomez knew little about these three workers and Gomez was not in a managerial position to know if the Respondent had actually hired new workers. More significantly, union shop steward Hernandez never testified that he was aware of any new workers employed by the Respondent after December 25. Hernandez, who also worked as a cleaner at the car wash, would have been cognizant of any new workers because of his position as a union official and his responsibility to ensure that new workers are oriented and recruited by the Union.

The Respondent argued that there were only two additional workers hired after December 25. I credit Palacios’ testimony over Gomez since Palacios actually hired the workers. Palacios testified that one was a re-employed worker by the name of “Garcia” who was always hired every year during the late December through March time frame and would have been hired regardless of Castillo’s employment. The second hire was a cashier and not a cleaner (Tr. 59, 88). The “Hire Rehire” report confirms that Garcia and the cashier were the two hires in late December as testified by Palacios (GC Exh. 6 at 5).

Finally, the record shows that Castillo’s name continued to be on the work schedule after December 25 and through the first week of January 2016 (R. Exh. 2). The counsel for the General Counsel argues that the work schedule was fabricated by the Respondent after the fact to show that Castillo was not discharged. There is no factual basis for this contention especially in light of the fact that the Union would have scrutinized the work schedules and would have questioned the Respondent about Castillo’s name on the work schedule for the week of January 2016 especially since shop steward Hernandez testified that he was allegedly told by Castillo at the end of December about his discharge (Tr. 247).

Accordingly, I find that Yovanni Castillo did not engage or participate in any union or other protected activity prior to his discharge and consequently, the Respondent would not have any knowledge of such activity. I recommend the dismissal of this allegation.

C. The Respondent did not violate Section 8(a)(3) When on or about February 25, 2016, the Union Sought Reinstatement and the Respondent Refused to Reinstatement Yovanni Castillo to his Former Position

In the amended complaint at paragraph 10(a) and (b), the counsel for the General Counsel alleges that during the February 25, 2016 meeting, the Union, through Hernandez, sought reinstatement for Castillo. The Respondent, through Magalhaes, refused to reinstate Castillo to his former position (GC Exh. 7). Magalhaes testified that he did not call Castillo back to work because Castillo was never discharged. Magalhaes insisted that he inquired as to Castillo’s whereabouts with the shop steward Hernandez and with a few other workers that lived in Castillo’s general neighborhood. The Respondent contends that no one was able to reach Castillo (Tr. 334–337).

The General Counsel’s burden in establishing an unlawful

refusal to hire is set forth in *FES*, 331 NLRB 9 (2000). In order to prove such a violation, the General Counsel must establish three elements: first, that the employer was hiring or had definite plans to hire at the time of the alleged unlawful conduct; second, that the alleged discriminatees had experience or training relevant to the requirements of the position, or, alternatively, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and third, that antiunion animus contributed to the decision not to hire the alleged discriminatees. *Id.* at 12; also, *Harmony Corp.*, 349 NLRB 781, 782 (2007). *FES* provides that, if General Counsel establishes a prima facie case and the respondent “fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation,” a violation of Section 8(a)(3) of the Act is established.

Given the transitory employment nature of the car wash industry, there is no doubt that the Respondent was constantly losing and hiring replacement workers. There is also no doubt that Castillo was qualified and was trained to perform the job as a car wash attendant. What I find missing is a request to rehire Castillo. The General Counsel argues that during the February 25 meeting, the union shop steward, Hernandez, conveyed a request by Castillo for reinstatement to his former position of employment with the Respondent.

There is no credible evidence to support this contention. First, as made amply clear by counsel for the Union and the General Counsel, the February 25 meeting was not a meeting between the Respondent and the Union. The meeting was called by Magalhaes to explain his position over the alleged termination of Castillo.

The Union shop steward, Hernandez, was called to attend the meeting. I closely review the testimony of Hernandez regarding the February 25 meeting. At no point during this meeting did Hernandez demand that the Respondent reinstate Castillo to his former position. At no point during this meeting did Hernandez convey to Magalhaes a request from Castillo for reinstatement.

The General Counsel maintains that Castillo wanted his job back through the “Union’s letter.” GC Br. at 53. However, as consistently asserted by the Union, the “Union letter” was not a petition from the Union and was never sanctioned by the Union. Indeed, as already noted, the counsel for the Union insisted that the February 25 meeting was not a Union meeting. The signed petition submitted by workers from another car wash requesting that Respondent reinstate Castillo was not a union petition and did not originate from the Union. Hernandez testified that he did not know if the petition was a Union petition and if it was, Hernandez did not know who drafted the petition. As noted, the petition was not on Union stationery and was not identified as a union petition. As such, the petition was not a union petition and not sanctioned by the Union. Hernandez never told Magalhaes that the petition was the Union’s attempt to have Castillo reinstated. At most, the document was drafted by other workers without full knowledge of the particulars and based upon rumors and speculation as to what happened to Castillo.

Even assuming that there was a request to rehire Castillo, the

General Counsel has not shown there was any antiunion animus in the refusal to hire Castillo. I also credit to the testimony of Magalhaes when he testified that he did not call Castillo back to work because Castillo was never discharged. Any inquiries made to Castillo's whereabouts with the shop steward Hernandez and other workers that lived in Castillo's general neighborhood were to no avail.

Accordingly, based upon this review, I recommend the dismissal of this allegation.

D. The Respondent did not Violate Section 8(a)(1) When During the First Week of June 2016, Magalhaes Allegedly Interrogated Employees in Regard to the Union Activities and Other Protected Concerted Activities of Castillo

In the amended complaint paragraph 7(b), the counsel for the General Counsel alleges that Magalhaes interrogated employees at a meeting during the first week in June 2016 as to their knowledge of Castillo's alleged discharge and to assert that Castillo abandoned his job and was never discharged by the Respondent (GC Exh. 7). This meeting occurred just prior to their potential testimony as witnesses at this hearing. No witnesses for the General Counsel were examined in regard to this allegation although other car wash workers attended this meeting. This allegation was based upon the testimony of Respondent's witness, Eduardo Vasquez.

When determining if statements amount to threats of retaliation, the Board applies the test of "whether a remark can reasonably be interpreted by an employee as a threat." The actual intent of the speaker or the effect on the listener is immaterial. *Smithers Tire*, 308 NLRB 72 (1992); See also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee). The "threats in question need not be explicit if the language used by the employer or his representative can reasonably be construed as threatening." *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133, 133 (2001).

The Board has adopted the test established in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) to determine if management directly interrogating employees violates Section 8(a)(1) of the Act. *Hampton Inn NY—JFK Airport*, 348 NLRB 16 (2006); *Smithfield Foods*, 347 NLRB 1225 (2006). Under the *Bourne* test, the factors to consider are: the background; the nature of the information sought; the identity of the questioner; the place and method of interrogation; and the truthfulness of the reply. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). In applying these factors, I must assess whether, based on the facts of the specific case, the questioning at issue would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. *Rossmore House*, 269 NLRB 1176, 1177 (1984); *Temecula Mechanical, Inc.*, 358 NLRB 1225 (2012). Other factors include whether the employer gives assurances against reprisal or provides a reason for questioning the employee. (Id.). See generally *Bourne Co.*, above.

The Respondent maintains that the employees were never interrogated as to their knowledge of Castillo's situation. The Respondent maintains that the employees were merely informed of the upcoming NLRB hearing and that they should tell the truth if called as a witness for the Board hearing.

Eduardo Vasquez (Vasquez) testified on behalf of the Respondent. Vasquez has been employed at the Jamaica Car Wash for eight years, including the months of October, November, and December of 2015 and January of 2016. He is responsible for driving the vehicles when they exit the car wash. His hours are typically from 7 a.m. to 7 p.m. Vasquez is a union member.

Vasquez identified Magalhaes as the car wash manager. He denied hearing Magalhaes discussing anything about the union in November and December of 2015. Vasquez identified Palacios as his supervisor. Vasquez denied hearing Palacios talk about the Union in November and December 2015 to him or anyone else. Vasquez also knows Donald Montezuma as another management official at the car wash. Vasquez denied hearing Montezuma discuss anything about the Union in November or December 2015. Vasquez denied that Montezuma, Palacios or Magalhaes promised him money or raises if the Union was removed. Additionally, he denied hearing any similar conversations between those three and any other coworkers. Vasquez denied being promised additional hours for getting rid of the Union or overhearing management making any similar statements to his coworkers.

Vasquez denied being threatened with termination if he supported the Union. Vasquez denied being offered more money if he helped to get rid of the Union or overhearing any of Respondent's agents make similar statements to his coworkers. Vasquez denied being promised anything by the Respondent if he took a position against the Union or overhearing management officials make any similar statements to his coworkers. Vasquez denied being instructed by the Respondent not to speak to the Union or overhearing management officials make any similar statements to his coworkers. Vasquez denied ever being threatened by Palacios or Magalhaes regarding his support for the Union.

Vasquez testified that he knows Castillo because they worked together. The last time Vasquez saw Castillo was at the car wash on December 20. He remembers that the weather was bad that day and some employees were sent home because work was slow. He said that some stayed to clean the machines. Vasquez also knows Gomez. He was told that Gomez is a cousin of Castillo. Vasquez testified that he asked Gomez what happened to Castillo. He testified that Gomez told him that Castillo had found another job that pays more. Vasquez explained that after Castillo told him that, he was not satisfied with his long hours and low wages and that he was considering looking for work elsewhere. Vasquez testified to the following:

Q. You had conversations with -- These conversations were with Mr. Gomez or with Mr. Castillo?

A. Gomez, Francisco.

Q. Did Mr. Castillo ever tell you anything about whether or not he intended to keep working for the car wash?

A. Castillo?

Q. Yes.

A. Yes. Yovanni Castillo. No. He told me he doesn't know him. He's there a couple of months. He's about to look for another job in construction or in landscaping, preparing to earn a little bit more. Because there, he made little and he works many hours. The cold weather and he didn't like it (Tr. 364).

In sum, I find that Vasquez was not subjected to any coercive interrogation about his or any other employee's union or protected activities. Vasquez testified without contradictions or rebuttals that he was never threatened with termination or promised any benefits if he did not support the Union. The questioning of Vasquez was not coercive and his answers were freely provided to Magalhaes. Magalhaes questioned Vasquez about his conversation with Castillo, but the questions were not reasonably considered as threatening to Vasquez's employment situation. I find that the comments made by Magalhaes simply could not "reasonably be interpreted by an employee as a threat" or coercive in nature. *Smithers Tire*, above; *Andronaco, Inc. d/b/a Andronaco Industries*, 364 NLRB No. 142, slip op. at 10–11 (2016).

1. There was no Johnnie's Poultry Violation

The allegations in the amended complaint paragraph 7 also implicate the Board's seminal decision in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965). In that case, the Board articulated safeguards necessary to privilege an employer from 8(a)(1) liability where either the employer or its counsel chooses to question employees on matters involving their Section 7 rights in preparation for a hearing on an unfair labor practice complaint.

Briefly, the *Johnnie's Poultry* safeguards require: (1) that the employer or its counsel obtain the employee's voluntary participation after explaining the purpose of the questioning and providing adequate assurances that no reprisals will occur; (2) that the questioning itself be free of coercion in a context free from employer hostility to union organization; and (3) that the questioning must not exceed legitimate purposes by prying into other union matters, including the employee's own subjective state of mind, or by otherwise interfering with employee rights. *Albertson's LLC*, 359 NLRB 1341, 1359 (2013), affd. and incorporated by reference in 361 NLRB No. 71 (2014).

An employer loses the benefits of the privilege by transgressing the boundaries of these safeguards. Subsequent decisions establish that *Johnnie's Poultry* does not apply to trial preparation inquiries unrelated to matters involving the exercise of Section 7 rights, for example questions about standard work procedures. See, e.g., *Delta Gas*, 282 NLRB 1315, 1325 (1987), and the cases cited there.

Vasquez testified that Palacios asked him to come testify about a week or two before the proceedings. Vasquez and other workers met with Magalhaes at the car wash. The meeting was about the discharge of Castillo. Vasquez testified that

Magalhaes and Palacios were present at the meeting along with other employees. Vasquez did not testify that he was forced to attend the meeting against his own free will.

During the meeting, Magalhaes told everybody present that he was upset that Castillo claimed he had been terminated. Magalhaes told Vasquez there would be a court case over the discharge and asked Vasquez to testify (Tr. 366, 370).

Vasquez denied that Magalhaes stated at the meeting that some workers were saying that they were threatened by Magalhaes (Tr. 371). Vasquez stated that Magalhaes did not ask questions of the employees regarding the discharge at the meeting (Tr. 371). Vasquez stated that Magalhaes told him the following:

He talked to us about the case because the young man that we know, we know he was not fired from the job. He left the job himself, but he was saying that he was fired from the job, but it's not true. He stopped working because he found a better job. He wanted witnesses because no one the job – many people leave without saying anything. Many leave and they just come back to get paid and that's what happened to him. He disappeared without saying anything (Tr. 372).

The record shows that Magalhaes never told Vasquez there would be no consequences regardless of how he testified. However, Vasquez did testify that Magalhaes told him it did not matter how he testified. Vasquez testified that Magalhaes told him to come in and tell the truth (Tr. 373). Vasquez testified that Magalhaes never specifically told him he had a choice whether he wanted to testify or not. However, upon my questioning (Tr. 373), Vasquez testified:

JUDGE CHU: Let me ask. Did anybody tell you that your presence here as a witness was voluntary?

Vasquez: He talk about the case of the young man, you mean the man that I fired from the job, he said no. What we know, no one has fired him from here.

JUDGE CHU: That wasn't my question. Did anybody say you can come or you're free not to come?

Vasquez: I'm free.

In sum, Vasquez testified on his own free will as to what Magalhaes said at the meeting. There were no discussions on other union matters, Magalhaes did not tell Vasquez how to testify and Vasquez credibly testified that he voluntarily participated in the meeting and at the NLRB trial. *Albertson's LLC*, above. No other witnesses were presented by the counsel to the General Counsel to rebut his testimony as to what had occurred at the June 2016 meeting.

Accordingly, I find there was no interrogation of Vasquez (or any other employees that counsel for the General Counsel failed to identify) and no *Johnnie's Poultry* violation. I recommend dismissal of this allegation.

I recommend that the amended complaint be dismissed in its entirety.

Dated, Washington, D.C., January 9, 2017